JD–21-04
Washington, DC

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

STATE PLAZA, INC., a wholly owned
subsidiary of R.B. ASSOCIATES, d/b/a
STATE PLAZA HOTEL

Employer

and Case 5-RC-15599

HOTEL AND RESTAURANT EMPLOYEES
UNION, LOCAL 25, AFL-CIO

Union Petitioner

Jonathan Greenbaum, *Esq*. and Gina Lisher, *Esq.,*
of Washington, D.C., for the Employer.
Devki Virk, *Esq*. and Miguel Cordova,
of Washington, D.C., for the Union Petitioner.

RECOMMENDED DECISION ON OBJECTION

Robert A. Giannasi, Administrative Law Judge: Pursuant to a January 7, 2004, order of the Board directing a hearing and a January 13, 2004, notice of hearing, I held a hearing in this matter on January 23, 30 and March 2, 2004, in Washington, D.C.[1]

The case arises from the Employer's objections to a September 5, 2003, election in an appropriate unit of the Employer's hotel employees, which the Union won by a vote of 44 to 21, with one challenged ballot. The only remaining objection that is the subject of this case is as follows: "During the vote, [the Union's] observer during the morning session . . . engaged in prohibited electioneering conduct during her hours of duty and engaged in conversation with voters in Spanish on subjects material to the vote."[2] After considering supporting statements from the Employer and conducting his

[1] The hearing would have been concluded on January 23, but there were difficulties in obtaining the appearance of one of the Employer's witnesses. She eventually appeared on March 2, 2004, in part through the assistance of the Regional Office.

[2] The Employer elaborated on the objection, which was filed on September 11, 2003, with the following allegation: "Petitioner's morning observer, who is Spanish speaking, told voters at the polling place to "vote yes" (in Spanish) and engaged in other prohibited conversations in

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own investigation, the Regional Director for Region 5 overruled the objection without a hearing because, in his view, the factual allegations in the objection were not supported, and, even if they were, the conduct would not have affected the outcome of the election. The Employer appealed the matter to the Board, which granted review, directed a hearing, and stated, without elaboration, that the Employer's request for review raised "material issues of fact warranting an evidentiary hearing."

Based on the testimony at the hearing, my assessment of the credibility of the witnesses and their demeanor, the entire record before me, as well as the briefs of the parties, I make the following findings, conclusions and recommendation:

I. The Facts as Developed at the Hearing

The election was held on September 5, 2003, in the Diplomat Room at the Employer's premises, the State Plaza Hotel, in Washington, D.C. It was held in two segments, one in the morning and one in the afternoon. The relevant objection deals only with conduct that allegedly took place in the morning session. The Board agent conducting the election, a male, was accompanied by a Spanish language translator, also a Board agent and a female, because many of the employees spoke only Spanish. Also present apparently was another Board employee, identified as a trainee. Prior to the voting, the Board agent held a meeting with Union and Employer observers and representatives to discuss the ground rules of the voting procedure. The voters were admitted to the Diplomat Room one at a time to vote. No other voter was permitted in the room until the first voter had voted and left the room. The voter would first approach the Board agent who gave the voter a ballot, which was written in English, Spanish and Vietnamese. The voter then went past a table at which the Union and Employer observers sat, along with the translator and the trainee. The voter then dropped his or her completed ballot into the ballot box. The Board agent had instructed the election observers, who were both voting eligible employees, not to talk to the voters while they were in the Diplomat Room. The observers were required simply to verify that the voter was indeed an eligible employee. The Board agent also told the observers and representatives that, if voters asked questions about the ballot, the questions would be answered by him or another of the Board employees, including the translator.

In support of its objection, the Employer submitted the testimony of its election observer, Reginald C. Washington, who was still employed when he testified. He does not speak or understand Spanish. He testified that he overheard some conversation in Spanish that he could not understand between "several" voters before they were given a ballot and someone he was initially unable to identify. Only in response to my question did he identify the speaker as the Union's observer, who, Washington testified, was sitting next to the translator. Tr. 35-37. He also testified that he mentioned this to the Board agent, who did nothing, according to Washington. But he also testified that,

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Spanish with the voters. The Employer's observer did not speak or understand Spanish and inquired as to what Petitioner's observer was saying. There was no clarification at the polling place as to the conversations that transpired. This per se prohibited conduct and partisan display at the official polling place, is grounds for setting aside the election."

after he spoke to the Board agent, the conversations, which he described several times as "brief," stopped. Tr. 35, 43-44. Washington also testified that the translator did answer some questions about the ballot from voters and that she told Washington that she was explaining the ballot to the voter (Tr. 51).

The Union's election observer, Marleni Jiron, was also still employed by the Employer when she testified. She firmly denied having any conversations with voters in the voting area, both on direct and on cross examination (Tr. 61-62, 64). I found Ms. Jiron a completely candid and truthful witness, whose credibility is enhanced because she was testifying against her employer's interests and she survived sharp cross examination without faltering. Mr. Washington, on the other hand, was not a reliable witness. Even though he testified that several voters engaged in conversations with Jiron, no one corroborated his account. Even Carmen Reyes, another witness submitted by the Employer, did not testify in support of Washington's account. Nor was Washington's testimony as clear as Jiron's. For example, I believe that his initial inability to identify who was conversing with the voters in Spanish was the result of his confusion between the translator, who was, of course, permitted to speak to the voters, and the Union observer, who was not. According to Washington, the translator and the Union observer were sitting next to each other. His confusion is further supported by his frequent references to "Carmen" as the Union observer. See Tr. 37, 39, 41, 42. Washington's testimony is also a poor basis for making findings of fact because he described brief conversations which he did not understand. Nor is his testimony that he complained about those conversations to the Board agent and the latter did nothing plausible in the circumstances, especially in view of the instructions given by the Board agent. Based on my assessment of his demeanor, I felt that Washington exaggerated his testimony in this respect. Because of his confusion and lack of clarity and because his demeanor did not inspire confidence, I cannot credit Washington's testimony over that of Jiron. Indeed, I cannot credit any of his testimony unless it is corroborated by a credible witness.

The Employer also alleged that Jiron had a conversation with employee Carmen Reyes in the voting area, in which she allegedly told Reyes to vote "yes." As indicated above, Jiron credibly denied talking to any voters in the voting area. More specifically, she also credibly denied talking to Reyes in the voting area or telling her how to vote. Indeed, Reyes corroborated Jiron. She denied that Jiron spoke to her in the voting area or told her how to vote. Both witnesses testified that the translator told Reyes, as she told other employees, that if she wanted the Union, she should vote yes and if she did not, she should vote no. This is the most plausible explanation of what happened and I have no reason to doubt that that is what happened in this case. Indeed, Mr. Washington, the Employer's observer, confirmed that the translator spoke in Spanish to voters to explain the ballot and that the translator told him what she was doing.

The Employer, however, produced an unsworn, typed statement (in both English and Spanish), signed by Reyes and dated September 19, 2003, which stated that Reyes was "told by the union observer to vote "yes" in Spanish, in the polling place." Reyes testified that that statement was not true and it was produced because she was approached by a representative of the Employer to give a statement confirming that she had voted. According to Reyes, who is no longer employed by the Employer, the

statement she signed said something different than the unsworn, typed statement submitted in evidence by the Employer. Tr. 104, 106,115, 128, 130-131. The evidence at the hearing shows that the statement was prepared by Iris Martin, the Employer's Manager, who speaks and understands Spanish. She testified that she spoke to Reyes in Spanish and Reyes told Martin that "Marleni told her to vote yes." Tr. 121. Martin then wrote down what Reyes said; she did not ask Reyes to write in Spanish her version of what happened. Martin also testified that Reyes came forward of her own accord, although Martin's testimony in this respect is hearsay because, according to Martin, Reyes first approached another management official called "John." Tr. 122. I have some doubts about the statement. Significantly, the statement does not contain the name of Jiron, who was a friend of Reyes, even though Martin testified that Reyes mentioned Jiron by name when the statement was prepared (Tr. 121). Moreover, the circumstances under which Reyes came to sign the statement are unclear. For example, it would make sense that the Employer representatives would contact Reyes one day after the election, as she testified, rather than wait for her to contact them two weeks later and one week after the filing of the relevant objection, as shown by the date on the statement. Because of the ambiguous circumstances surrounding the origin of the statement, and because it was unsworn, was not in Reyes' own words, and was disavowed by Reyes, I cannot accept the statement as an accurate reflection of what happened during the morning session when Reyes voted.

At best, the Employer has established a conflict, which leads to the possibility that Reyes was either telling the truth at the hearing or in her unsworn statement. In my view, Reyes' sworn testimony before me is more reliable than the unsworn statement obtained by the Employer because of the questionable circumstances of its production and the fact that Reyes' testimony coincided with that of Jiron. Indeed, even if Reyes is not to be believed because of the conflict between her testimony and the unsworn statement, Jiron's credible testimony stands alone. Jiron's testimony is the clearest and most believable version of what happened in the voting area when Reyes voted: No conversation between them took place.

Reyes gave another statement, this one a sworn affidavit, to the Board during its investigation of this case. The statement is more reliable than the unsworn affidavit taken by the Employer's representatives. As the petitioner points out in its brief (Br. 16), the sworn statement is not inconsistent with Reyes testimony at the hearing—and that of Jiron—that the translator, not Jiron, was the person who spoke with Reyes and that the translator simply explained the ballot. The Board affidavit describes the person who talked to Reyes, but it describes someone other than Jiron, most likely the translator. Although the Board affidavit states that the person told Reyes "yes" softly in Spanish, the context of the affidavit makes it clear that the statement was made in connection with explaining the ballot; and this is the substance of Reyes' testimony. In any event, the Board affidavit is clearly inconsistent with the unsworn statement produced by the Employer. Not only does the Board affidavit not identify the union observer as having made the statement, but it does not say that the person told her to "vote yes." In fact, the affidavit simply describes the woman who read the ballot to Reyes and states that, after she finished reading the ballot, the woman said "in a soft voice, "yes" in English." Consideration of the Board affidavit confirms Jiron's version of the events, that is, that Jiron did not talk to Reyes or tell her to vote "yes."

In its brief, the Employer appears to shift gears and, in reliance on the Board affidavit, to assert that the translator told Reyes to vote yes and that should be the basis of overturning the election (Br. 7, 10-11). Aside from the procedural problems created by such a changed approach—the objection does not allege that the translator did anything wrong, I do not find that the translator said anything of the kind to Reyes. The only support for this assertion is a strained reading of the Board affidavit and parts of Reyes' testimony stating that the affidavit was accurate (Tr. 99, 114). But the affidavit does not say that the translator told Reyes to vote yes. It says that, after reading the ballot to Reyes, the translator said yes in English in a soft voice. Reyes testified that the person who explained the ballot to her simply told her that she should vote yes if she wanted the Union and no if she did not (Tr. 114, 116-117, 118). Indeed, Jiron's testimony confirms that the translator simply explained the ballot and the procedure to Reyes (see Tr. 61). That is the most plausible explanation for the statement in the affidavit.

At most, the Employer has again shown a conflict between Reyes' testimony and her affidavit with respect to what the translator told her. This conflict, like the other conflict in Reyes' testimony with respect to her unsworn statement, is unavailing to the Employer. It simply highlights that neither Reyes' testimony nor her affidavit, standing alone, is a sufficiently reliable basis on which to make findings of fact. Nor did the Employer attempt to call the translator or any other witness to support its new view of the situation. Because of the conflicting accounts given by Reyes, and because the Employer's objection is not otherwise supported by credible evidence, I cannot find that Reyes was told either by Jiron or by the translator, or by anyone else, to vote yes in the voting area during the morning session of the election.

II. Analysis and Conclusion

Based on my credibility determinations set forth above, I find that neither Jiron nor the translator told Reyes to vote yes in the election. Accordingly, the Employer has not proved facts in support of its objection. Thus, no impropriety took place that would require a new election. I am confirmed in this view because the petitioner was chosen by an overwhelming margin in an election that was conducted in an exemplary manner. The ground rules of the election insured the integrity of the process and insulated the voting area from contamination. The Board agent gave explicit instructions that were not violated. Moreover, only one voter at a time came into the voting area and there never was a time at which there was more than one voter in the voting area during the voting. In these circumstances, I find that the election was valid and the Employer's objection to the election is overruled.

III. Recommended Decision and Order

The Employer's objection 1 is overruled and the matter is remanded to the Regional Director for Region 5 for appropriate action.[3]

Dated, Washington, D.C., March 23, 2004.

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Robert A. Giannasi
Administrative Law Judge

[3] Pursuant to the provisions of Section 102.69 of the Board's Rules and Regulations, within 14 days from the date of issuance of this recommended decision and order, either party may file with the Board in Washington, D.C. an original and eight copies of exceptions thereto. Immediately upon filing such exceptions, the party filing them shall serve a copy upon the other parties and a copy with the Regional Director. If no exceptions are filed to this decision and order, the Board may adopt the decision and order as its own.